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No. 84-763

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AUGUSTIN J. SAN FILIPPO, ESQ.,

Petitioner,

vs.

UNITED STATES TRUST COMPANY OF NEW YORK, J. GREGORY VAN SCHAACK and BRUCE P. DENNEN,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

New York, New York
13 December 1984

BARRY, MCTIERNAN & MOORE
Attorneys for United States Trust Company of New York J. Gregory Van Schaack and Bruce P. Dennen
115 Broadway
New York, New York 10006
(212) 964-4270

MICHAEL F. CLOSE
Counsel for Respondents

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Pursuant to Rule 28.1, United States Trust Company of New York states: It is a wholly-owned subsidiary of U.S.Trust Corporation and affiliated with U.S.Trust Company of Florida; UST Advisory Company, Inc.; United States Trust Company International Corporation; United States Trust Company of New York (Grand Cayman), Ltd.; United States Trust Company of New York, Ltd.; Financiere UST, S.A.

TABLE OF AUTHORITIES

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Petitioner's Falsifications of the Record

In the face of the Second Circuit's finding that there was "no evidence whatever" "for charging that the defendants had given any false testimony", 21a, and that the "substantial evidence implicating San Filippo in the Morans' fraudulent scheme establishes *beyond doubt* that there was probable cause for his prosecution" 23a n.6 (emphasis supplied), San Filippo brings to this Court an issue he never raised below although fully apprised of it by respondents' opening brief in the Second Circuit. Proving that "many self-perceived victims of defamation are animated by something more than a rational calculus of their chances of recovery", *Herbert v. Lando*, 441 U.S. 153, 204

(1979) (Marshall, J., dissenting), San Filippo has so egregiously misrepresented the record that his petition can only be described as a deliberate falsification. Respondents rely on the Second Circuit's statement of what were the *uncontested* facts before the district court and will simply correct the errors of the petition.

On 5 January 1981, after the New York limitations period under N.Y.C.P.L.R. §215(3) of one year for malicious prosecution had expired, plaintiff-petitioner filed this §1983 malicious prosecution action in the Southern District of New York, alleging in substance that respondents/cross petitioners[1] "conspired"[2] with an assistant district attorney for New York County, one Matthew Crosson, to present false evidence to, and withhold exculpatory evidence from, the grand jury which indicted San Filippo for grand larceny in July 1978. Contrary to San Filippo's petition at 5 in which he now attributes the District Attorney's "conspiracy" motive to San Filippo's refusal to cooperate in a pending investigation, the record is undisputed, indeed, petitioner's own brief below at 23 admitted, that San Filippo's meeting with the District Attorney occurred *after* his indictment, as the Second Circuit noted (13a), so the petitioner's argument that "[t]he District Attorney's involvement [in presenting false evidence to the grand jury] was apparently motivated by petitioner's refusal to cooperate with his office in another related investigation" is frivolous.

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[1] Respondents are filing herewith a conditional cross petition under this Court's Rule 19.5.

[2] Nothing in the complaint or the record below sets forth the basis of the "conspiracy" between cross petitioners and Crosson or indeed states any joint objective except a desire "to obtain information" complaint at ¶¶ 6, 21, 32, about San Filippo's clients and confederates, the Morans, and no reason has ever been proposed why either respondents or the District Attorney needed or desired any such information. Indeed, the petition in this Court at 3 alleges that respondents presented false evidence *to the investigating officers of the District Attorney's office* and petitioners' brief to the Second Circuit at 7, 21 similarly alleged that defendants had lied to the District Attorney. If this were so, then there is no "conspiracy" with the DA, since a "conspiracy" presupposes that the DA knew the truth and chose to present a lie, not that respondents, as San Filippo continues to allege, misled the DA.

Incredibly, San Filippo unashamedly asserts in this Court that "[his] non-involvement in the making of this misrepresentation [i.e., about the bogus $9,000,000 trust] was necessarily known by the bank officers[3] and would necessarily have been confirmed by any fair investigation of the matter by the District Attorney's office." In fact the undisputed record shows the following:

That San Filippo's attorney in his criminal trial on his opening statement *admitted* that San Filippo had made the $9,000,000 trust representations to the defendants (San Filippo's defense being that he did not know the representation was false).[4] San

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[3] Petitioner's statement that "efforts to depose the two bank officers . . . have been repeatedly resisted by the officers, the most recent tactic being [to claim absolute immunity]" is a complete misrepresentation of the record. In fact, Van Schaack and Dennen had appeared for their depositions, which *plaintiff's* counsel adjourned by agreement because he had been unable to provide the agreed upon specifications of exactly what grand jury testimony was perjured. Thirteen days after the opinion issued in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the defendants moved below under F.R.Civ.P. 26(c) to stay all discovery, which included depositions of both plaintiff and defendants, on the grounds that *Harlow* mandated a stay of discovery pending determination of an immunity defense. Although this motion was denied, plaintiff later stipulated to such a *Harlow* stay pending determination of summary dismissal rather than face defendants' appeal on the *Harlow* issue; *see* Judge Gagliardi's opinion at 27a, n.1. Plaintiff's stipulation also stayed his own deposition as well as defendants' discovery motion pending below testing (i) plaintiff's claims of attorney-client privilege with respect to the Morans; (ii) plaintiff's claims of attorney-client and work-product privileges with respect to testimony sought by defendants from his criminal attorney; and (iii) defendants' complaints about the sufficiency of plaintiff's interrogatory and document responses. Since plaintiff was as much the beneficiary of his stipulation as the defendants, this record is clearly why "[t]he Second Circuit made no reference to the fact . . . that the respondents' refusal to be deposed had made it impossible for petitioners to flesh out the conspiracy allegations" petition at 9. By the time briefs were filed in the Second Circuit, there was no live controversy regarding the deposition orders because the district court had stayed all proceedings pending resolution of the appeal.

[4] So she wants a loan, and he says: Well, I can call up the United States Trust, and I'll ask them if they are interested.

Well, you can imagine. He calls Mr. Van Schaack and he says: My client, *(cont. next page)*

Filippo's own trial testimony *admitted* he orally made the representation that there was a $9,000,000 trust".[5]

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[4] *(footnote cont.)* Dora Dodge Moran, is interested in borrowing some money from your bank.

Well, it wasn't one of these things, I don't think we'll be interested. *He then tells them, because they are a trust company, he then tells them that she is the beneficiary of a trust, and they say, right away, either in that conversation or later, that they would like to get that nine million dollar trust in their bank. That would be a large piece of business for them.*

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So he takes them down and they sit down with Mr. Van Schaack and a Mr. Bruce Dennen, who is his supervisor, who is there because of two things:

#1. Mr. Van Schaack only has authority to loan up to fifty thousand dollars and

#2. *Mr. Dennen is interested in this potentially large client for the bank.*

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Fahringer's opening to the jury, E91-E93 (Emphasis supplied).

[5] Q Mr. San Filippo, let me ask you this: how did the discussion of the trust fund come up at that meeting?

A Well, while they were looking over the financial statement which has been now marked Defendant's Exhibit "O" they saw the $9,105,000 in Municipal Bonds. And, they asked about these bonds and where were they and what they consist of and so on.

Q Who asnwered those questions?

A Mrs. Moran said that these were bonds that were due to her from the Anna Dodge estate as a result of an agreement she had made with the Anna Dodge when her husband, Horace, died

Q *Did you incidentally or did you from time to time did you speak of the trust also?*

A *I mentioned that there was a trust agreement to that affect; yes.*

Q Now in terms of the trust, tell us as best you can recall what the conversation was between Mrs. Moran and either Mr. Dennen or Mr. Van Schaack concerning the trust fund?

A *They became very interested in having Mrs. Moran buy* (sic) *the trust corpus once she received it to their bank* and she (sic) had some kind of a soft sell about how they handle the very wealthy people and they can establish

(cont. next page)

San Filippo's "involvement" in the bogus $9,000,000 trust scheme consisted of elaborate representations he made in writing to U.S. trust, Manufacturers' Hanover, Chase Manhattan, Barnett Bank of Florida over the course of four years, as detailed in the Second Circuit's opinion 5a; 8a-11a, 23a n.6.

After hounding the defendants for four years, San Filippo, who has possessed the defendants' grand jury testimony since June 1979 is still unable to specifically state what the grand jury perjury was and quote the perjured testimony verbatim. There is no reason this Court should take the extraordinary step of deciding in the first instance an issue never raised below.

REASONS FOR NOT GRANTING THE WRIT

I

THIS COURT HAS ALREADY APPROVED PENDENT APPELLATE JURISDICTION ON A CIVIL CASE

Petitioner argues that a criminal case, *Abney v. United States*, 431 U.S. 651 (1977) ("*Abney*") precludes the exercise of pendent appellate jurisdiction once jurisdiction is assumed over a collateral final order. The Second Circuit, which cited *Abney* in the same opinion and which has followed *Abney* in criminal cases, *e.g.*, *United States v. Klein*, 582 F.2d 186, 196 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979), never addressed this issue because petitioner never raised it, despite the fact that the pendent appellate jurisdiction issue was briefed in defendants' opening brief in the Second Circuit.

Petitioner's argument ignores a direct contrary holding. In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) ("*Eisen*"), this Court specifically upheld an exercise of appellate jurisdiction pendent to a collateral final order appeal under §1291, where the pendent matter was closely related to the §1291 appeal taken under *Cohn v. Beneficial Industrial Loan Corp.*, 337

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[5] *(footnote cont.)* a good portfolio and we'll be very happy to handle your business. It was along those lines.

San Filippo's trial testimony at E967-E968 (emphasis supplied).

U.S. 541 (1949) ("*Cohen*" or "*Cohen* appeal"). In *Eisen* the collateral final order was the requirement by the district court that defendants be assessed 90% of the cost of notice to the plaintiff class. The Court ruled that the order requiring defendant to post the cost was reviewable under *Cohen* and because the Appeals Court had *Cohen* jurisdiction, it could go on to review all aspects of the district court's class action notice order, because they were closely related.[6]

Abney is distinguishable from *Eisen* on two grounds:

First, *Abney* was a criminal case. The restrictions on appeal have particular force in criminal prosecutions because "encouragement of delay is fatal to the vindication of the criminal law." *United States v. MacDonald*, 435 U.S. 850, 854 (1978) (quotation omitted). *MacDonald*, reviewing the collateral final order doctrine in a criminal appeal, emphasized "the importance of the jurisdictional question to the criminal law" 435 U.S. 850, 853 demonstrating that the *Abney/MacDonald* rule is confined to criminal cases.

Secondly, *Abney* apparently envisioned that *all* claims of double jeopardy would be immediately reviewable.[7] In contrast,

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[6] Analysis of the instant case reveals that the District Court's order imposing 90% of the notice costs on respondents likewise falls within "that small class." It conclusively rejected respondents' contention that they could not lawfully be required to bear the expense of notice to the members of petitioner's proposed class. Moreover, it involved a collateral matter unrelated to the merits of petitioner's claims. Like the order in *Cohen*, the District Court's judgment on the allocation of notice costs was "a final disposition of a claimed rights which is not an ingredient of the cause of action and does not require consideration with it," *id.*, at 546-547, and it was similarly appealable as a "final decision" under §1291. In our view the Court of Appeals therefore had jurisdiction to review fully the District Court's resolution of the class action notice problems in this case, for that court's allocation of 90% of the notice costs to respondents was but one aspect of its effort to construe the requirements of Rule 23(c)(2) in a way that would permit petitioner's suit to proceed as a class action. (Footnote omitted).

Eisen, supra, 417 U.S. 156, 172.

[7] Admittedly, our holding may encourage some defendants to engage in dilatory appeals as the Solicitor General fears. However, we believe that such *(cont. next page)*

a *Cohen* order in a civil case must present a "serious and unsettled question" as a threshold matter or as the Second Circuit put it "substantial enough arguments" need be presented to support appealability. *E.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731, 742-43 (1982) (Presidential immunity was both serious and unsettled for jurisdictional purposes); *see Williams v. Collins*, 728 F.2d 721, 724-25 (5th Cir. 1984); *Weight Watchers v. Weight Watchers Int'l., Inc.*, 455 F.2d 770, 773 (2d Cir. 1972).

This Court has exercised pendent appellate jurisdiction in other contexts.[8] *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) is a good example. Harlow's appeal was accepted on the basis of absolute immunity. *See* 457 U.S. at 806 n.11. While rejecting the absolute immunity claim on its merits, the Court went on to determine the scope of qualified immunity, not itself the jurisdictional basis of the appeal, and the Court declined on prudential, not jurisdictional, grounds to dismiss the pleading for failure to state a claim. 457 U.S. at 820 n.36. Just as in the case below, the qualified immunity issue clearly presented "sufficient overlap" with the absolute immunity to justify reviewing both together. As the Court itself noted, however, in *Nixon*, unless these issues were properly "in" the Court of Appeals, it had no jurisdiction under 28 U.S.C. §1254(1). 457 U.S. at 741-42. As a learned treatise noted of the *Abney* decision:

> Although the Court's opinion does not consider the possibility, it should not be read to preclude considerations of some collateral rulings where special

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[7] *(footnote cont.)* problems of delay can be obviated by rules or policies giving such appeals expedited treatment. It is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy.

Abney, 431 U.S. 651, 662 N. 8.

[8] *See Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, ____ (1983) (approving pendent jurisdiction over "all matters on which the validity of the final order is contingent"); *Chadha* has subsequently been cited to support a narrow rule of pendent jurisdiction in immigration appeals. *E.g.*, *Mohammadi-Motlagh v. INS 727 F.2d 1450, 1452 (9th Cir. 1984).*

> circumstances suggest that this course would be desirable, and that there has been no attempt to abuse the collateral order appeal opportunity.
>
> Wright, Miller, Cooper & Gressman, Federal Practice & Procedure, Volume 16 §937 (Supp. 1983 at 119).

The Courts of Appeals have therefore exercised appellate jurisdiction pendent to a *Cohen* appeal under §1291 when it would be an "appropriate" exercise of jurisdiction and "would assist judicial economy", *Allied Paper Inc. v. United Gas Pipe Line Co.*, 561 F.2d 821, 825 (T.E.C.A. 1977) (*Cohen* jurisdiction over stay order gave pendent jurisdiction over cross appeal). *Metlin v. Palastra*, 729 F.2d 353, 355 (5th Cir. 1984), is a good example. Determining to "exercise pendent jurisdiction", 729 F.2d at 354, the 5th Circuit accepted an appeal from the denial of absolute immunity and reversed on the basis of qualified immunity: a ground it recognized as not separately appealable. 729 F.2d at 355. Like the Second Circuit below, the Fifth Circuit recognized that dispositive issue "requires only a routine application of settled principles"[9] 729 F.2d at 355. *Accord*, *Florida Farmworkers Council, Inc. v. Marshall*, 710 F.2d 721, 726-27 (11th Cir. 1983) (exercising "ancillary" jurisdiction); *Vickers v. Trainor*, 546 F.2d 739, 747 (7th Cir. 1976) (§1291 appeal justified review of otherwise non appealable class certification).[10] *See England v. Rockefeller*, 739 F.2d 140, 143 (4th Cir. 1984) (recognizing the power but declining to exercise it), cert.

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[9] It is well settled that a mere conclusory allegation of "conspiracy" fails to state a claim which can survive a 12(b)(6) motion, as the Second Circuit noted at 22a.

[10] There is, however, an apparent conflict in the circuits. *Contra, United States v. Yellow Freight System, Inc.*, 637 F.2d 1248, 1251 & n.2 (9th Cir. 1981), *Forsyth v. Kleindienst*, 599 F.2d 1203, 1209 (3d Cir. 1979), *Akerly v. Red Barr System*, 551 F.2d 539, 543 (3d Cir. 1977) (refusing pendent jurisdiction). However, only the Third Circuit has applied *Abney* to a civil case, and none of these courts considered either *Eisen* or *Harlow*.

Petitioner is correct to note that pendent appellate jurisdiction as exercised below or in *Eisen*, *supra* has important parallels where the court undertakes a discretionary review of the sufficiency of the complaint on review of the grant or denial of a preliminary injunction, citing, *e.g.*, *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940). He makes no persuasive case, however, why the exercise of pendent appellate jurisdiction, itself a matter of discretion, should be construed in opposite ways depending upon how appellate jurisdiction is originally acquired. §1292(a)(1) appeals were authorized because of a "need to permit litigants to effectively challenge interlocutory orders of serious, perhaps irreparable, consequence," *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 181 (1955), but this is a restatement of Justice Jackson's *Cohen* Formulation: "When [a final judgment is reached] it will be too late effectively to review the present order, and the rights conferred by the Statute, if applicable, will have been lost, probably irreparably." *Cohen*, 337 U.S. at 546. Thus in either case the policy rationale of §1292(a)(1) or of *Cohen* is very much the same. True it is that §1291 "on its face" does not contemplate pendent jurisdiction over other issues but §1292(a)(1) "on its face" does not contemplate pendent jurisdiction over the merits of the complaint, nor, for that matter, did the grant of jurisdiction under §303(b) of the Labor Management Relations Act of 1947 "on its face" contemplate the district courts would exercise pendent jurisdiction over Gibbs' state law claims against the United Mine Workers, *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The touchstones remain "judicial economy, convenience, and fairness to litigants", 383 U.S. at 726, in all three cases.

Similarly, petitioner's "floodgates of appeals" argument, if it were indeed a genuine policy objection would apply equally well to jurisdiction pendent to a §1291(a)(1) appeal. Litigants would be encouraged to bring colorable, if not frivolous, claims or counterclaims for preliminary injunctions so as to secure interlocutory appellate review of a more serious but otherwise unappealable issues. The answer in either case is that pendent review is a matter of discretion which may be rightly exercised to prohibit "a waste of judicial resources", always an appropriate

policy consideration. The correct way to control the "floodgates of appeals" is to (i) insist that the jurisdictional requirements of both §1292(a)(1) and the *Cohen* doctrine be firmly adhered to; and (ii) exercise pendent jurisdiction only where "there has been no attempt to abuse the collateral order appeal opportunity", Wright, Miller, Cooper and Gressman, *supra*[11] and that the pendent issue is factually or legally closely related to the appealable issue.[12]

Foreclosing pendent review here would not have narrowed the "floodgates": Defendants, armed with a decision on point by this Court which had not heretofore been cited or construed in §1983 litigation, *Vogel v. Gruaz*, 110 U.S. 311 (1884), and a more recent opinion extolling the virtues of private witness immunity *Briscoe v. La Hue*, 460 U.S. 325 (1983), would hardly have not appealed the absolute immunity defense even if other issues could not be reviewed; the Second Circuit's "independent review" as petitioner has it at 9, simply recites the undisputed facts on the record before it. "[O]nce a case is lawfully before

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[11] For example, faced with an appeal of "obviously little merit", the Fifth Circuit for that reason alone refused to consider pendent jurisdiction on other issues. *Shoja v. IND*, 679 F.2d 447, 451 (5th Cir. 1982); similarly, *Kenyatta v. Moore*, #83-4753 (5th Cir. 29 Oct. 1984) (frivolous absolute immunity appeal would not support pendent jurisdiction over qualified immunity).

[12] The "stringent" requirements, as the Second Circuit put it, *Port Authority Police Benevolent Association, Inc. v. The Port Authority*, 698 F.2d 150, 153 (2d Cir. 1983), of pendent appellate jurisdiction require that the initial order be "clearly appealable", *ibid.*, and the pendent issue be closely related to the appealable issue. *Ibid.* This is the essential doctrine followed by every appellate court. *E.g.*, *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 808 (5th Cir. 1982); *State of New York v. Nuclear Regulatory Com.*, 550 F.2d 745, 760 (2d Cir. 1977); *Jenkins v. Blue Cross Mutual Insurance, Inc.*, 522 F.2d 1235 (7th Cir. 1975). When the pendent issue is not closely related jurisdiction will not be exercised over it. *Shaffer v. Globe Protection, Inc.*, 721 F.2d 1121, 1124 (7th Cir. 1983); *Kershner v. Mazurkiewicz*, 670 F.2d 440, 445 (3d Cir. 1982) (*en banc*); *Loya v. INS*, 583 F.2d 1110, 1113 (9th Cir. 1978); *General Motors Corporation v. City of New York*, 501 F.2d 639, 644-47 (2d Cir. 1974).

a Court of Appeals, it does not lack power to do what plainly ought to be done." *Mercury Motor Express, Inc. v. Brinke*, 475 F.2d 1086, (5th Cir. 1973), quoting 9 Moore's Federal Practice 110.25[1](2d Ed. 1972).

II

THE APPLICATION OF THE COLLATERAL FINAL ORDER DOCTRINE TO A COMMON LAW ABSOLUTE IMMUNITY DOES NOT WARRANT REVIEW BY THIS COURT

Although petitioner argues that "[l]ower courts need guidance from this Court as to the applicability of the *Cohen* collateral order doctrine to denial of [common law] absolute immunity claims", he cites no such lower court needing any such guidance. No lower court has ever imagined that the collateral finality of the denial of absolute immunity might turn on the common law versus constitutional nature of the immunity for several excellent reasons.[13]

Most important, nothing in the *Cohen* formula as repeatedly cited by this Court has ever incorporated a "constitutional" examination of the issue raised. The right asserted in *Cohen* to have the plaintiff shareholder post a bond for litigation costs was clearly of statutory, not constitutional, dimension. Similarly, the defendants in *Eisen*, objecting to being assessed with 90% of the cost of class notice, asserted issues strictly under Federal Rules of Civil Procedure 23. The right vel non of a private

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[13] Every Court which has addressed the issue has held that an order denying a defense of absolute immunity is immediately appealable. *E.g.*, *Strothman v. Gefreh*, 739 F.2d 515, 517 n.1 (10th Cir. 1984)' *Chavez v. Singer*, 698 F.2d 420, 421 (10th Cir. 1983); *William v. Collins*, 728 F.2d 721, 724-26 (5th Cir. 1984); *Bever v. Gilbertson*, 724 F.2d 1083, 1086 (4th Cir. 1984). The circuits are divided however, whether an order denying a defense of qualified immunity is immediately. *See Kenyatta v. Moore*, #83-4753 (5th Cir. 29 October 1984) (collecting cases). The appealability of a denial of qualified immunity is before this Court in *Mitchell v. Forsyth*, #84-335, *cert. granted*, 29 October 1984, 53 U.S.L.W. 3324.

witness to be free of retaliatory frivolous litigation is clearly just as important as the rights at stake in *Cohen* or *Eisen*. No good reason is put forward why absolute immunity from suit, unlike any other potential *Cohen* issue, should be appealable only if constitutionally based.

Second, the absolute immunity of Judges, *Pierson v. Ray*, 386 U.S. 547 (1967), and prosecutors, *Imbler v. Pachtman*, 424 U.S. 429 (1976), two very frequent targets of §1983 suits, is not constitutionally based. Adoption of San Filippo's suggestion would mean they can no longer test their immunity from suit on interlocutory review.

Third, requiring a "constitutional" test for *Cohen* appeals would create much needless constitutional analysis simply to determine the threshold issue of jurisdiction. Immunity decisions reflect a subtle interrelationship of constitutional and common law antecedents. *See, e.g., Smith v. McDonald*, 737 F.2d 427 (4th Cir. 1984), *cert. granted*, #84-476, 53 U.S.L.W. 3404 (26 November 1984), construing the petition clause in light of common law principles. It has been heretofore unnecessary to decide for example, to what extent the absolute immunity recognized in *Butz v. Economou*, 438 U.S. 478, 512 (1978), is of a "constitutional" or "common law" dimension. Adopting a constitutional test for jurisdiction over *Cohen* appeals would make this necessary.

Indeed, in this very case the absolute immunity defense has constitutional underpinnings. The only serious question regarding the application of *Briscoe* is whether absolute immunity applies only to testimony on the stand. Respondents argued in the district court and the Second Circuit that the immunity for off the stand contacts between the DA and the two witnesses was an aspect of the informers' privilege and that there was

indeed, a "constitutional right to inform",[14] thus in the case at bar a difficult source of law question would have to be determined as an ingredient of the threshold issue of jurisdiction.

In short, no lower court has ever expressed a need to determine whether the *Cohen* doctrine turns on the "constitutional" or common law basis of the asserted immunity. If any court were ever to raise the question, only one answer could be given. The issue neither warrants nor deserves this Court's review.

CONCLUSION

A writ of certiorari should not issue to review the order of the Second Circuit.

New York, New York
13 December 1984

Respectfully submitted,

BARRY, MCTIERNAN & MOORE
Attorneys for
United States Trust
Company of New York,
J. Gregory Van Schaack and
Bruce P. Dennen
115 Broadway
New York, New York 10006
(212) 964-4270

MICHAEL F. CLOSE
Counsel for Respondents

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[14] Citing below *inter alia*, *Re Quarles*, 158 U.S. 532, 535-36 (1895); *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1342-43 (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1977) (constitutional right to complain to IRS about its employee; tort action dismissed); *Rusack v. Harsha*, 470 F. Supp. 285 (M.D. Pa. 1978) ("right to inform" is analogous to First Amendment right to petition); *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961); *Brown v. Glines*, 444 U.S. 348, 361 (1980) (Brennan, J., dissenting).